STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2011
v	No. 299343 Calhoun Circuit Court
STAFANO ADEESA DAVIS, Defendant-Appellant.	LC No. 2010-000927-FC

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant Stefano Adeesa Davis was convicted by jury of voluntary manslaughter, MCL 750.321, and possession of a firearm during commission of a felony, MCL 750.227b. The trial court sentenced him to seven to 15 years' imprisonment for the manslaughter conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm defendant's convictions and remand for reconsideration of the scoring of offense variable (OV) 13 and correction of the presentence investigation report (PSIR).

I

This case arises out of the shooting death of Demar Johnson. Johnson was shot and killed in the parking lot of a locksmith shop in Battle Creek, Michigan in the early morning hours of January 24, 2010. On appeal, defendant argues that his conviction for voluntary manslaughter was against the great weight of the evidence. We disagree.

Defendant raised this issue in a post-conviction motion for a directed verdict or a new trial. A new trial may be granted where the verdict was against the great weight of the evidence. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). We review a trial court's ruling on a motion for a new trial based on the claim that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage

of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *Id*. at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "'Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination.'" *Id*., quoting *Lemmon*, 456 Mich at 645-646 (internal quotation marks omitted). "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *Lemmon*, 456 Mich at 637. The jury may choose "to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), citing *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975).

Defendant admits that he knew Johnson and that he was in the locksmith parking lot when the shooting started. He claims, however, that he was wrongfully identified as the shooter.

Chanelle Williams and Shawn Roberts, who are cousins, testified that on the night of the shooting, they attended a party at the Elks Club, which was across the street from the locksmith parking lot. When the club closed, they continued partying together in the parking lot. Williams testified that she spoke to Johnson just before the shooting; they were standing between her car and the SUV that Johnson had been driving. She also observed defendant pass Johnson between the two vehicles. Williams testified that there had recently been a problem between defendant and Johnson. Although she was aware of a rumor that Johnson had killed defendant's father, she believed that defendant simply did not like who Johnson spent time with, and that was the problem between them. Roberts testified that there had been some animosity between defendant and Johnson because of the rumor about Johnson killing defendant's father.

In regard to the shooting itself, Williams testified that immediately after defendant passed Johnson between the two vehicles, she turned to get in her car. She then heard a gunshot. She turned around and saw Johnson climbing over the seats of the SUV. She believed he had entered the SUV at the driver's seat and was climbing into the back seat. She then heard more shots. Roberts testified that he first heard a single shot and then several additional shots back to back. He "saw someone standing in between the driver's side . . . door shooting in here and the driver." Johnson was in the driver's seat of the SUV and was shot. Roberts saw Johnson climb over the seats toward the back seat while the additional shots were fired. Additionally, Roberts was the only witness who identified defendant as the shooter. Roberts initially testified that he could not unequivocally identify the shooter, but then admitted that he had identified defendant as the shooter at the preliminary examination, that he had testified truthfully then, and that his prior testimony was still true.

Defendant argues that Williams' and Robert's description of the shooting, particularly that Johnson was on the driver's side of the SUV at the time of the shooting, "'contradicted indisputable physical facts or defied physical realities,'" *Musser*, 259 Mich App at 219, and, therefore, that the entirety of their testimonies was incredible. Defendant is correct that portions of their testimonies conflicted with the physical evidence presented at trial. Officer Kevin Farnham testified that when he arrived at the scene of the shooting, he found Johnson's body on the passenger side of the SUV. The only place in the SUV that the police found blood was the floorboard of the back seat on the passenger side. There was also a bullet hole in the rear door

on the passenger side and five bullet casings around another vehicle parked on the passenger side of the SUV. Officer Joel Shepperly believed, based on that evidence, that the shooter was probably on the passenger side of the vehicle.

We note that Sean Steverson's description of the shooting closely aligned with the physical evidence. Steverson testified that he attended the party at the club with Johnson and two other guys that he did not know (one of whom was Richard Broomfield). Johnson had driven them to the party in the SUV. When the four of them left the party, they got into the SUV, briefly drove around, and then parked in the locksmith parking lot. Girls in the parking lot were arguing, and later started fighting. Johnson, who had been driving, got out of the SUV. Steverson was seated in the back seat on the passenger side. He observed Johnson try to break up one of the fights and talk to a girl. At some point, Steverson heard a gunshot. He ducked and then Johnson appeared at Steverson's door. Johnson opened the door and said, "Get me out of here dog, some ho ass motherfucker just got me," meaning that he had been shot. Steverson then saw someone shoot Johnson in the back. Johnson fell in on Steverson. The shooter continued to fire shots at Johnson, and Steverson climbed over the seats into the driver's seat of the SUV, and then got out of the SUV and fell to the ground. Steverson ran to Johnson, who was then lying on the ground. Leroy Wharton, the DJ at the party who observed the shooting from the doorway of the club, similarly testified that he heard a single gunshot and then, after a pause, six or more shots fired in close succession. The shooter was standing on the passenger side of the SUV and ran away after the shooting. Broomfield also testified that Johnson was shot at the rear passenger door of the SUV and fell in on Steverson.

While Steverson's and Wharton's testimonies closely aligned with the physical evidence presented at trial and Williams' and Roberts' did not, it does not follow that the entirety of their testimonies lacked credibility. As indicated, it is for "the jury to determine questions of fact and assess the credibility of witnesses," *Lemmon*, 456 Mich at 637, and the jury may choose "to believe or disbelieve, in whole or in part, any of the evidence presented," *Perry*, 460 Mich at 63. It is possible that the jury believed that Williams and Roberts may have altered portions of their testimonies out of fear of retaliation. After Roberts testified at the preliminary examination, the windows in Williams' car and her father's truck were "busted out." Roberts was living with Williams at the time. He testified that he had been threatened repeatedly, both before and after the examination. Steverson, on the other hand, was not from the area and there was no evidence that he had been threatened.

It is also possible that the jury believed that Williams and Roberts were simply confused on certain points of their testimony, given how quickly the shooting occurred and the chaos surrounding them in the parking lot. Multiple witnesses testified that the parking lot was dimly lit and that there multiple fights between girls occurring at different spots in the parking lot. Williams, Roberts, Steverson, and Wharton all testified that they heard a single gunshot, a pause, and then several more shots in close succession. Williams and Roberts believed that Johnson was on the driver's side of the SUV when the shooting started and that he then climbed over the seats to the back seat of the SUV. Steverson testified that he did not see Johnson when he heard the first shot, but that after the first shot, Johnson appeared at his door, i.e., the rear passenger door. Johnson indicated that he had already suffered one gunshot wound. There were then additional shots, Johnson fell in on Steverson, and Steverson climbed over the seats to the front of the SUV. This corresponds with the forensic pathologist's testimony that defendant suffered

one "very superficial" gunshot wound to "the front of the right flank area" and several additional wounds to his back and the back of his shoulder and neck. Considering all of the testimony together, it is not implausible to conclude that Johnson was on the driver's side of the SUV when the first shot was fired, suffered one superficial wound, ran to the passenger side of the SUV, and was then shot again from behind, suffering the additional wounds once he was on the passenger side of the vehicle. Williams and Roberts believed that they saw Johnson climb from the front of the SUV to the rear, but in reality, they may have seen Steverson climbing from the rear to the front. Williams' and Roberts' testimonies were not "'so far impeached'" that they were "'deprived of all probative value'" or otherwise unbelievable. See *Musser*, 259 Mich App at 219. The jury was free to believe their testimonies that Johnson was rumored to have killed defendant's father, that the two passed each other just before the shooting, and, ultimately, Roberts' identification of defendant as the shooter.

Defendant further argues that the jury's verdict was against the great weight of the evidence given the witnesses' varying descriptions of his apparel the night of the shooting and the physical appearance of the shooter. Williams and Roberts testified that defendant had on a black fitted hat or baseball cap with ear flaps and a black coat that was either all leather or partially leather, with lettering or designs in red and possibly other colors. Roberts believed that it was a letterman's jacket and that defendant was also wearing black jeans. Steverson testified that although it was difficult to see the shooter, he believed the shooter was wearing black and some red. On the other hand, Tonaiko Mabin, who saw defendant at the party, testified that defendant was wearing a brown leather coat and a black "brim hat" without earmuffs, Wharton testified that defendant was wearing a "fancy coat" like a "Pelle coat" at the club, and defendant, his mother, his sister, and his friend Ramone Rowland-Crawford testified that he was wearing a brown leather Pelle coat with fur and a black baseball cap. We again note, however, that it is for the jury to determine questions of fact. *Lemmon*, 456 Mich at 637. Defendant also points out Steverson's testimony that the shooter appeared "skinny" and Wharton's testimony that the shooter was "more tall than short." Defendant asserts that he is neither skinny nor tall; therefore, he could not have been the shooter. But both Steverson and Wharton testified that it was very difficult to see the shooter. Wharton could not even determine whether the shooter was a man or a woman.

The evidence presented at trial does not preponderate "so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. Accordingly, we hold that the jury's verdict was not against the great weight of the evidence, and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

II

Defendant next argues that the trial court abused its discretion by permitting the prosecution to admit Broomfield's statements to Detective Brad Wise, particularly his statements that defendant threatened Johnson just before the shooting. We agree that the trial court abused its discretion in admitting the extrinsic statements to impeach Broomfield under the circumstances presented, but find that reversal is not required because the error was harmless.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Evidentiary decisions involving preliminary questions of law, such as whether a rule of evidence or statute precludes admissibility, are reviewed de novo. *Id*. "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id*. "A preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id*. at 495-496 (internal quotation marks omitted). To the extent defendant claims that the trial court's admission of the evidence violated his due process rights, this issue is unpreserved. Defendant did not raise a constitutional argument before the trial court. We review an unpreserved claim of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id*. at 763 (citations omitted).]

Reversal is warranted only if plain error seriously affects the fairness, integrity, or public reputation of the judicial proceedings or results in the conviction of an actually innocent defendant. *Id*.

"The credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). "The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *Id*. "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a prosecutor may not introduce evidence of a statement that directly inculpates the defendant under the guise of impeachment if (1) the substance of the statement is relevant to the central issue of the case and (2) there is no other testimony from the witness for which his credibility was relevant to the case. *Id*. at 682-683; *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994). *Stanaway* further explained that "a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *Stanaway*, 446 Mich at 693.

In this case, Broomfield testified that he did not hear defendant say anything to the victim. Over objection, the prosecutor then read aloud lengthy portions of the statement Broomfield made to Detective Wise, in which Broomfield described defendant saying to the victim that he believed the victim had killed his father and that he was planning to take revenge.

The trial court held that the questions and answers the prosecutor read into the record were admissible under MRE 613(b), as extrinsic evidence of prior inconsistent statements by Broomfield.[1]

The substance of Broomfield's prior statements to Detective Wise were relevant to the central issue of the case, and therefore, they meet the first prong of the *Stanaway* analysis. Furthermore, while Broomfield testified to other relevant evidence, it favored the prosecution's theory. Therefore, the prosecution had no need to attack Broomfield's credibility. Consequently, the second prong of the *Stanaway* analysis is also satisfied; neither *Stanway* nor *Kilbourn* stand for the proposition that otherwise inadmissible hearsay transforms into permissible extrinsic impeachment when the witness's other testimony is favorable to the prosecution. Because the prosecutor had no need to challenge Broomfield's credibility with respect to his other testimony, admission of his prior statements to Wise was unnecessary and amounted to subterfuge for the substantive use of inadmissible hearsay. Indeed, in closing argument, the prosecution did not challenge any of Broomfield's testimony with the exception of his testimony that he heard no threats. Similarly, in its brief on appeal the prosecution does not assert any other basis for the impeachment of Broomfield other than to address his denial that he heard defendant threaten the victim.

Although the trial court erred, we find that the error was harmless in light of the proofs and the verdict. There was eyewitness testimony from Roberts indicating that he saw defendant shoot the victim, and several witnesses testified that it was generally believed that Johnson had killed defendant's father. Also, the jury acquitted defendant of first degree and second degree murder, convicting him instead of manslaughter. For these reasons, we do not believe that it is "more probable than not that a different outcome would have resulted without the error," *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

III

Defendant also argues that the trial court improperly scored OV 13 at ten points. We remand for reconsideration of the score.

The sentencing court has discretion in determining the number of points to be scored for the sentencing variables provided that there is evidence on the record that adequately supports the scoring. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635,

[1] The trial court instructed the jury in regard to the purpose of prior inconsistent statements:

> If you believe that a witness previously made a statement inconsistent with his or her testimony at this trial, your only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said is true.

671; 672 NW2d 860 (2003). We review de novo the proper interpretation and application of sentencing guidelines. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007).

OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43. If the offense being scored was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property, the trial court must score OV 13 at ten points. MCL 777.43(1)(d). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

In scoring ten points for OV 13, the trial court considered defendant's manslaughter conviction in this case, a charge for carrying a concealed weapon (CCW), MCL 750.227, for which defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., and charges that were pending against defendant for receiving and concealing a stolen firearm, MCL 750.535b, and felony firearm,[2] MCL 750.227b.[3] The trial court indicated that because all of those offenses "relate to weapons" and would qualify as either a crime against a person or property a score of ten points was proper. Defendant challenged the scoring at sentencing.

On appeal, defendant asserts and the prosecution concedes that the trial court erred by concluding that CCW is a crime against a person or property. CCW is a crime against public safety, MCL 777.16m, not a crime against a person or property. Therefore, it cannot be used in scoring OV 13. See *People v Bonilla-Machado*, 489 Mich 412, 415-416; __ NW2d __ (2011) (holding "that the six named offense category designations used in MCL 777.5 and 777.11 through 777.19 apply to the scoring of offense variables and, therefore, a felony designated as a "crime against public safety" may not be used to establish a "pattern of felonious criminal activity involving 3 or more crimes against a person," MCL 777.43(1)(c), for purposes of scoring OV 13"). Additionally, defendant attaches to his brief on appeal an OTIS[4] report indicating that after he was sentenced in this case, he was tried on the charges that had been pending against him. He was convicted and sentenced for CCW and felony firearm. The report does not list a conviction or sentence for receiving and concealing a stolen firearm. As indicated, CCW is not a crime against a person or property, and it cannot be used in scoring OV 13. Defendant asserts that felony firearm is also a crime against public safety and not a crime against a person or property. But the Legislature has not given felony firearm an offense category designation. Given the Supreme Court's holding in *Bonilla-Machado*, we must conclude that felony firearm cannot be used in scoring OV 13. Notably, the prosecution does not assert that the offense should be so used.

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[2] The trial court actually referenced a pending charge for "possession of a firearm by a felon." But defendant's PSIR indicates that the charge pending against him was felony firearm, i.e., possession of a firearm during commission of a felony.

[3] Defendant's PSIR indicates that a CCW charge was also pending against him, although the trial court made no reference to it.

[4] OTIS stands for the Michigan Department of Correction's Offender Tracking Information System.

That said, the prosecution argued at sentencing and cursorily argues on appeal that the facts underlying the charges against defendant support a score of ten points under OV 13, regardless of what offenses he was charged with or convicted of.[5] MCL 777.43 provides that all offenses "shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Thus, under the plain language of the statute, uncharged conduct can be counted for purposes of OV 13. However, factors used in sentencing must have support in the record, *Hornsby*, 251 Mich App at 468, and where effectively challenged, must be proved by a preponderance of the evidence, *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). In *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994), this Court explained that once a defendant has effectively challenged an issue of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted, and "if the record provides insufficient evidence upon which to base the decision supporting or opposing the scoring, the court in its discretion may order the presentment of further proofs."

Here, there is no evidence that the conduct underlying the charges against defendant would support the trial court's scoring of OV 13, other than the prosecutor's statements in that regard at sentencing. Defense counsel refuted the prosecutor's statements, and the trial court made no reference to them in issuing defendant's sentence. Without something more, the prosecutor's statements cannot be said to constitute record evidence sufficient to support the court's scoring of OV 13.

Accordingly, we remand for reconsideration of the scoring of OV 13.[6] The trial court, in its discretion, may permit the presentation of proofs. If the trial court determines that the prosecution has established, by a preponderance of the evidence, that defendant committed a combination of three or more crimes against a person or property as is required under MCL 777.43(1)(d), then OV 13 was properly scored and the court may deny resentencing. If, however, the court determines that defendant did not commit three such crimes, the court should consider whether to resentence defendant. See *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994), overruled in part on other grounds *People v McGraw*, 484 Mich 120 (2009).

Additionally, we note that defendant's PSIR incorrectly states that he was convicted by plea for his offenses in the instant case. He was convicted by jury. The PSIR should be corrected on remand.

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[5] At sentencing, the prosecutor asserted that defendant's conduct underlying the CCW charge for which he was adjudicated under HYTA amounted, at a minimum, to a felonious assault. The prosecutor did not specifically reference the facts underlying the charges pending against defendant at the time of sentencing. It is not clear in the record, but it appears that both parties, and possibly the trial court, may have mistakenly believed that one of the charges pending against defendant, receiving and concealing a stolen firearm, MCL 750.535b, is a crime against a person or property, when it is actually a crime against public safety. See MCL 777.16z.

[6] On the sentencing grid for Class C offenses, MCL 777.64, without the scoring of ten points for OV 13, defendant's OV level is reduced from level VI to level V.

We affirm defendant's conviction and remand for reconsideration of the scoring of OV 13 and correction of the PSIR. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering